IN THE

Supreme Court of the United States

No. 538

JOHNNIE LEE MORRIS,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner, Johnnie Lee Morris, a Negro, was indicted and tried for murder in the District Court for Harris County, Texas. He was found guilty and a sentence of life imprisonment was recommended by the jury after the introduction of evidence held sufficient to sustain the verdict by the Court of Criminal Appeals of Texas in *Morris v. State*, 251 S.W. 2d 731 (1952).[1]

[1] Petitioner, an ex-convict, was found guilty of the murder of Florian Antone Nowak, the driver of a City of Houston bus, by cutting and stabbing him with a knife. In its opinion the Texas Court of Criminal Appeals stated:

"The offense is murder; the punishment, life.

"By all the witnesses, it was established that the homicide occurred inside, and at the front end of, a

Petitioner filed a motion to quash the indictment on the ground that he was denied the equal protection of laws and due process of law guaranteed by the 14th amendment to the United States Constitution. As grounds for these contentions Petitioner alleged in his motion that only four Negroes have served as grand jury commissioners in Harris County in the forty years preceding Petitioner's indictment and that no Negro served on the grand jury commission which selected the grand jury which indicted the Petitioner (Tr. 20-26). Considerable testimony was offered by Petitioner in support of his

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City of Houston bus, while taking on passengers on Main Street at approximately 2:30 p.m. on October 11, 1951. The appellant, a 23-year old ex-convict, was a passenger; the deceased was the driver of the bus. The lethal weapon was a pocket knife with a blade 3 or 3½ inches long.

"As appellant entered the bus, he had some words with a fellow passenger. Because of this controversy, the deceased tendered the appellant a transfer in lieu of the fare he had paid and suggested that he get off the bus and catch the next one, in order to avoid trouble that seemed to be pending. In reluctant compliance with this suggestion, appellant prepared to leave the bus; but, instead of getting off at the rear exit as instructed by the deceased, he proceeded to leave by the front door, where other passengers were entering. It was at this juncture that the assault took place.

"Appellant does not claim that deceased was armed in any way, but contends that deceased had kicked him; that they began to fight; and that he cut deceased in order to get free from him.

"Appellant admitted having drawn his knife and opened the blade upon entering the bus because of the alleged abusive conduct toward him by the fellow passenger in question. A woman, who was entering the bus as appellant prepared to leave, was cut on the ear by appellant's knife as he drew back the same preparatory to cutting the deceased."

motion to quash in an attempt to establish the number of Negroes in Harris County eligible for service on grand jury commissions. (Tr. 172-235). It was agreed between counsel for the State of Texas and counsel for Petitioner that four Negroes served as members of grand jury commissions in Harris County between September, 1936, and November, 1951.[2] Actually, the period should be reduced by five years as the four Negro grand jury commissioners all served between 1941 and 1951, with three of these serving in 1950 and 1951. (Tr. 170.) The motion to quash was overruled by the trial court. (Tr. 235.)

After the selection of a petit jury, and before Petitioner pleaded to the indictment, Petitioner filed a motion to quash the petit jury panel for racial discrimination in the selection and empaneling of a petit jury in the case. (Tr. 52-61.) In essence the objection of Petitioner in this motion was an alleged use of peremptory challenges on the part of attorneys for the State to exclude from the petit jury.

Considerable testimony was offered by Petitioner in his attempt to support the motion to quash the

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[2] "Now, it is agreed between the state, represented by Honorable Sam W. Davis, Criminal District Attorney of Harris County, Texas, and Honorable Spurgeon Bell, Special Prosecutor, and the Attorneys representing the defendant that during the time embraced between the September term, 1951, there have been drawn in Harris County, Texas, sixty-one grand jury commissions; that four members of such commissions have been Negroes, and that only one Negro was appointed to serve on four different grand jury commissions; that the District Judge who drew the names and appointed the members of the grand jury commissions of the sixty-one grand jury commissions that have been empaneled since the September term of said Court, 1936, and the November term, 1951, was a white man and that he was a member of the Caucasian race. (Tr. 170-171)."

petit jury. (Tr. 262-288.) The motion was overruled by the Court. (Tr. 288.)

STATEMENT OF THE CASE

The crux of Petitioner's objections in his application for writ of certiorari can be narrowed to two basic contentions.

(1) Petitioner claims that his rights guaranteed to him by the Federal Constitution were denied by illegal discrimination in the selection of the grand jury commission which selected the grand jury which indicted the Petitioner for murder, for which offense he was convicted.

(2) Petitioner claims that his rights guaranteed to him by the Federal Constitution were denied by illegal discrimination in the selection of the petit jury primarily through the exercise of peremptory challenges on the part of the State.

At no point does Petitioner question the method established by statutes in Texas for the selection of grand jury commissioners. He merely asserts that the legal method was abused in this particular instance.

Petitioner also claims no discrimination in the selection of the grand jury. At no point in Petitioner's brief is there any indication that the grand jury, selected by the jury commission of which he complains, did not meet every legal requirement with no discrimination in the membership thereof.

No objection is made by Petitioner as to the method provided by statute for the selection of petit jurors. Again, petition merely asserts that the method provided for by the statutes were abused.

RESPONDENT'S COUNTER POINTS

1. There was no showing by Petitioner of clear and intentional discrimination in the selection of grand jury commissioners.

2. There being no claim of discrimination in the selection of the grand jury by the grand jury commissioners complained of, the lack of Negroes upon the jury commission does not constitute a violation of the 14th Amendment to the Constitution of the United States.

3. The right of peremptory challenge of petit jurors is one to reject, not select, and no rights guaranteed to Petitioner under the Federal Constitution were violated by exclusion of Negroes from the petit jury through the exercise of peremptory challenges by the State.

RESPONDENT'S COUNTER POINT ONE
(Restated)

There was no showing by Petitioner of clear and intentional discrimination in the selection of grand jury commissioners.

Argument and Authorities

Selection of grand jury commissioners in Texas for the purpose of selecting members of the grand jury is provided for by statute. These statutes are Articles 333-339 of the Texas Code of Criminal Procedure and are set forth in the appendix hereto. No complaint is made by Petitioner as to the invalidity of any of these statutes or portions thereof, or to

the fairness of the statutory system. The entire objection entered by Petitioner is that only four Negroes served as grand jury commissioners in Harris County over a period of thirty (30) to forty (40) years.

Petitioner probably could have gone even further back and extended the number of years, but such a contention does not present an accurate account of events in Harris County, Texas. Regardless of any discrimination which might have been practiced in ancient history, the record as made by Petitioner clearly demonstrates there has been no recent discrimination in Harris County, Texas, against Negroes in the selection of grand jury commissioners. Three Negroes were chosen as grand jury commissioners in Harris County, Texas, during the years of 1950 and 1951.

The fact that there were no Negroes on the particular grand jury commission which in 1951 selected the grand jury which indicted Petitioner is of no consequence as a mixed jury commission in each instance certainly is not required by the equal protection clause of the 14th Amendment, if, in fact, that clause even is concerned with the composition of the grand jury commission as such.

This Court has held that a mixed grand jury in each case is not required by the equal protection clause of the 14th Amendment.[3] It requires only that

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[3] *Martin v. Texas*, 200 U. S. 316, 320 (1906). "A different conclusion in this case would mean that, in a criminal prosecution of a Negro for crime, an allegation of discrimination against the African race because of their race, could be established by simply proving that no one of that race was on the grand jury that returned the indictment or on the petit jury that tried the accused; whereas, a mixed jury,

there be no intentional and systematic exclusion of Negroes from grand jury service solely because of race.[4] Systematic exclusion may be shown by a long continued exclusion of Negroes from grand jury service.[5]

If these criteria are essential to a showing of discrimination in the selection of a grand jury, clearly they would be equally appropriate regarding the secondary grand jury commission. The facts in this case cannot warrant a finding of 'clear and intentional' discrimination and the very fact that no Negro was included on the three-member grand jury commission in issue is of no consequence.

The evidence presented before the Court on Petitioner's motion to quash the grand jury commission reveals no 'clear and intentional discrimination' against Negroes in the selection of grand jury commissioners is geing practiced in Harris County, Texas.

Judge Langston King testified that in selecting the personnel of grand jury commissioners his only purpose was to select grand jury commissioners who

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some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment . . . ."

Snowden v. Hughes, 321 U.S. 1, 8 (1944): "... But a discriminatory purpose is not presumed ...; there must be a showing of 'clear and intentional discrimination' ... But a mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination."

[4] Ibid.

[5] *Patton v. Mississippi*, 332 U.S. 463 (1948); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Norris v. Alabama*, 294 U.S. 587 (1935).

would select a fair grand jury of reputable citizens and that he never had in mind at any time either to give a proportional representation to any particular race or to limit the proportional representation to any particular race. (Tr. 205.) Judge King testified that in instructing his grand jury commissioners they were told that in the selection of grand jurors there must be no discrimination between race, religion, creed, or color, and certainly that no citizen must be excluded from grand jury service because of any such race or religion or creed. (Tr. 215.) Judge King said his sole purpose was to select outstanding, qualified citizens on the grand jury commission who in turn would select, as charged by the Court, good citizens on the grand jury who had no bias or prejudice against any person of any kind. (Tr. 216.)

Judge Frank Williford, Jr. testified that, in the selection of grand jury commissioners, it had never been his purpose at any time to discriminate in favor of or against any race. He said he undertook to get good citizens from widely scattered portions of the County as commissioners. (Tr. 222.) Judge Williford testified that he charged the grand jury commissioners chosen by him to select as grand jurors honorable, upright, law-abiding citizens and not to discriminate, nor to discard any person by reason of any race, color or religion. (Tr. 222.)

Judge A. C. Winborn testified that in selecting grand jury commissioners he never had in mind or as his purpose to in any way discriminate against any particular race or in favor of any particular race. He testified he instructed the grand jury commissioners chosen by him not to discriminate against

or in favor of anyone on account of their race or religion, condition of servitude, or for any other reason in the selection of grand jurors, but simply to select sixteen (16) good citizens. (Tr. 233.)

These three district judges have selected all grand jury commissioners in Harris County, Texas, for a period of some fifteen (15) years including the one herein complained of.

Petitioner, through five other witnesses, introduced evidence in an attempt to establish the number of Negro citizens of Harris County, Texas, as well as some evidence in the form of estimates as to the number of Negro citizens who were property owners, eligible to vote, read and write and of good reputation. (Tr. 172-235.) This Court has held that proportional representation of races on a jury is not a constitutional requisite.[6] If this is true as to a jury certainly it is even more applicable to a grand jury commission.

Many factors and requirements must be considered in the qualifications of a grand jury commissioner. These are provided for in Articles 333 and 339 of the Texas Code of Criminal Procedure.[7] The very fact that there are a certain number of Negro citizens of Harris County, Texas, who qualify as to one of these prerequisites for grand jury commissioners does not make a *prima facie* case of any number or proportion who satisfy all prerequisites and cannot be considered sufficient to establish a *prima facie* case of discrimination.[8] When all factors and

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[6] *Akins v. Texas*, 325 U.S. 398, 403 (1945). See *Cassel v. Texas*, 339 U.S. 282, 286 (1950).

[7] See Appendix, page 23.

[8] See *Cassel v. Texas*, 339 U.S. 282, 284 (1950).

qualifications are considered it cannot be said that Negroes in Harris County, Texas, are not receiving proportionate representation on either grand jury commissions or grand juries although such proportionate representation is not required by the Constitution of the United States.

Under no criteria heretofore established as to grand juries can it be said as a matter of law that there has been any intentional discrimination in the selection of grand jury commissioners in Harris County, Texas, nor is there any *prima facie* showing of discrimination in the selection of the grand jury commissioners who selected the grand jury which indicted Petitioner for murder. The contention of Petitioner that he was deprived of his rights guaranteed by the Federal Constitution because of discrimination in the selection of the grand jury commission must be overruled for this reason alone.

RESPONDENT'S COUNTER POINT TWO
(Restated)

There being no claim of discrimination in the selection of the grand jury by the grand jury commissioners complained of,the lack of Negroes upon the jury commission does not constitute a violation of the 14th Amendment to the Constitution of the United States.

Argument and Authorities

Petitioner assumes an untenable position in claiming denial of his rights under the Federal Constitution because no Negroes were placed on the grand jury commission when he makes no claim of discrimi-

nation by these commissioners in the selection of the grand jury which indicted him.

The grand jury commission plays but a secondary or ancilliary role. It is but a means to an end as its sole purpose is to select sixteen (16) men from the citizens of the different portions of the country to be summoned as grand jurors for the next term of court or the term of court for which said commissioners were selected to serve as directed in the order of the court selecting the commissioners, as provided in Article 338, Texas Code of Criminal Procedure.[9]

Injury to the rights of Petitioner as guaranteed by the Federal Constitution can come only from the grand jury which returns the indictment or the petit jury which returns the verdict. Under no conceivable situation could his rights be injured by a grand jury commission so long as the grand jury commissioners select qualified, fair and competent grand jurors without discrimination because of race, color or for any other reason.

Even had discrimination been practiced in the selection of the grand jury commissioners—this was not done in the instant case—the rights of Petitioner as guaranteed by the Federal Constitution would not be violated if the grand jury selected qualified grand jurors without discrimination.

The grand jury commissioners are unlike grand jurors. Grand jurors hear the evidence and return the indictment. They play an active role in the ultimate results. An indictment and conviction are both essential elements in the determination of the rights of an accused. The same cannot be said of a grand

[9] See Appendix, page 25.

jury commission which merely chooses the grand jury which launches the legal machinery which affects any rights of an accused.

Had the grand jury commissioners practiced discrimination because of race or color in the selection of the grand jury the rights of petitioner as guaranteed by the Federal Constitution would have been infringed. This was not the situation and Petitioner makes no claims to that effect.

The uncontroverted evidence is that two of the sixteen (16) members of the grand jury panel which indicted Petitioner were Negroes. (Tr. 231.)

Judge Langston King testified that Negroes, without discrimination by exclusion or limitation, were chosen on grand juries for Harris County, Texas, from 1940 until the date of the trial of Petitioner (Tr. 205-215). The stipulation entered into by all parties in open court shows that Negroes repeatedly served on grand juries in 1950 and 1951. (Tr. 231.)[10]

The uncontroverted facts demonstrate that, regardless of what happened previously, since the decision of this Court in *Cassell v. Texas*, 339 U.S. 282 (1950), Negroes have been placed on grand juries

[10] "It is stipulated by and between the State and the defendant and his counsel that on the grand jury for the August term, 1950, there were three members of the grand jury who were members of the Negro race; that on the grand jury for the November term, 1950, there were three members of the grand jury who were members of the Negro race; for the February term, 1951, there were two members of the Negro race; for the May term, 1951, there were three members of the Negro race on the grand jury; for the August term, 1951, there were two members of the Negro race on the grand jury; and for the November term, 1951, there were two members of the Negro race on the grand jury."

and grand jury commissions in Harris County, Texas, without any discrimination because of race or color.

The grand jury commissioners which indicted Petitioner were chosen by the district judge without discrimination; the district judge charged the grand jury commissioners to select grand jurors without discrimination because of race or color; the grand jury commissioners followed these instructions and selected grand jurors of whom Petitioner does not complain. Clearly there has been no discrimination in violation of Petitioners rights as guaranteed by the Federal Constitution, and the fact there were no Negroes on this particular grand jury commission does not violate Petitioner's rights.[11]

What the United States Constitution prohibits is racial discrimination in the selection of grand jurors.[12] If such discrimination is caused because of racial discrimination in selection of grand jury commissioners there is ground for complaint. The ultimate test, however, must be made in the composition of the grand jury and not in the grand jury commission which serves only to select the grand jury.

If Petitioner's contention is to be carried to its ultimate conclusion then discrimination would result in the criminal trials of all Negroes in Texas. Grand jury commissioners are appointed by district judges as provided in Article 333, Texas Code of Criminal Procedure.[13] All district judges in Texas are members of the white race. If the test as to dis-

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[11] *Thomas v. State*, 95 S.W. 1069 (Tex. Crim. App. 1906). 38 Corpus Juris Secundum 1004.

[12] *Smith v. Texas*, 311 U.S. 128 (1940).

[13] See Appendix, page 23.

crimination can be made one step removed from the grand jury—in the grand jury commission—it can be made two steps removed therefrom. This would mean that the rights of a Negro are infringed because the district judge who appoints the grand jury commission which selects the grand jury is without exception a member of the white race to the exclusion of Negroes. In the event a district judge resigns or a vacancy occurs, the vacancy is filled by appointment by the Governor, who, without exception, has always been a member of the white race. Thus, three steps removed, would be the charge of discrimination because the Governor who appointed the district judge who appointed the grand jury commissioners who selected the grand jurors, was not a Negro.

The ultimate test must lie in the grand jury for all the other groups or individuals are but ancilliary entites who cannot affect, for better or worse, the rights of an accused, so long as the grand jury is chosen without discrimination as to race, color or any other reason.

The only case cited by Petitioner in behalf of his claim that discrimination in the selection of grand jury commissioners infringed his rights as guaranteed by the Federal Constitution is *Smith v. State*, 69 S.W. 151 (Tex. Crim. App. 1902). This case clearly does not support the contention of Petitioner that discrimination in the selection of grand jury commissioners in itself is violative of his rights as guaranteed by the Federal Constitution. A reading of the complete opinion by the Texas Court of Criminal Appeals reveils that the ultimate test of discrimination was placed in the selection of grand jurors.

Grand jury commissioners were deliberately selected who would discriminate against Negroes and did so discriminate in selecting the grand jurors. The Court clearly conceded that even such a grand jury commission "might prove equal to the responsibilities thus cast upon them" but went on to find from the testimony that there was discrimination "in drawing the lists of grand and petit jurors who presented the indictment, and from which the petit jury was made up and tried him." There is not one statement in this cited ruling which even indicates that discrimination in the selection of the grand jury commissioners is in itself sufficient to deprive Petitioner of his constitutional rights. Those rights can be violated only if the grand jury commissioners discriminate in the selection of the grand jury which Petitioner, by his silence, admits did not happen in his case.

The opinion of the Texas Court of Criminal Appeals when this case was before it,[14] and Appellant, Petitioner here, contended there had been a systematic exclusion of members of the colored race in the selection of the grand jury commissioners of Harris County, Texas, contains an excellent discussion of the issue here being considered. All cases cited or referred to by Petitioner on this point were carefully considered in that opinion in which the judgment of the trial court was affirmed. Respondent believes the Texas Court of Criminal Appeals in this opinion fully covers the question of systematic exclusion of Negroes from the grand jury commis-

[14] *Morris v. State*, 251 S.W. 2d 731 (Tex. Crim. App. 1952). Tr. 514-519.

sioners in Harris County, Texas, and adopts every word of that opinion.

The grand jury commission is but a statutory body and it is well established that such a commission is not a necessary element in the conviction of an accused. Even the grand jury is optional with the several States and indictment by information or complaint could be substituted.[15] There is no challenge here made to the statutory system of Texas which provides for grand jury commissioners. Petitioner has failed, not only to establish his contention that discrimination was practiced in the selection of the grand jury commission, but has not shown where he has been harmed or his rights jeopardized by such discrimination even if it occurred, inasmuch as he can show no discrimination or injury in the grand jury which indicted him.

RESPONDENT'S COUNTER POINT THREE
(Restated)

The right of peremptory challenge of petit jurors is one to reject, not select, and no rights guaranteed to Petitioner under the Federal Constitution were violated by exclusion of Negroes from the petit jury through the exercise of peremptory challenges by the State.

Argument and Authorities

Petitioner contends his rights as guaranteed by the Federal Constitution were infringed because of discrimination in the selection of the petit jury which returned the verdict against Petitioner.

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[15] *Hurtado v. California*, 110 U.S. 516 (1883).

The formation and selection of petit juries in capital cases are provided for by statute in the State of Texas as a part of its local practice act. Chapter 2 of Title 8, Articles 587-601A, Texas Code of Criminal Procedure, sets out the manner and method of empaneling a special venire; Chapter 3 of Title 8, Articles 602-625, sets out the manner of jury call, mode of questioning and examining jurors as well as many other details, and Chapter 3 of Title 8, Article 614, provides for peremptory challenge of prospective jurors.[16]

Again it might be pointed out that Petitioner does not challenge the constitutionality of any of these statutes nor does he challenge the fairness of the system. His entire objection goes to the method by which the system was allegedly used in Harris County, Texas, to discriminate against Negroes in the selection of the petit jury.

Petitioner indicates on page 20 of his brief in support of petition for writ of certiorari that some significance should be attached to the coincidence that fifteen (15) Negroes were on the petit jury panel and the State under Article 614 of the Texas Code of Criminal Procedure, has fifteen (15) peremptory challenges in capital cases. Yet petitioner offered no evidence to the trial court on his motion to quash the petit jury to support any claim that the number of Negroes drawn on the petit jury list was deliberately limited to fifteen (15). Not one scintilla of evidence was effered to show that the procedure provided for by statute was not followed to the letter when the petit jury panel was drawn. In view of

[16] See Appendix, page 27.

this failure, Petitioner is in no position to claim discrimination as to race or color because the number of Negroes, legally and duly drawn on the petit jury list or special evnire, happened to be the number (15), no more or no less.

It was stipulated between the State and Petitioner (Tr. 286-287) that of the fifteen (15) Negroes on the special venire that two were excused at their request upon asserting legal excuses. One asserted he was more than sixty (60) years of age and the other advised the Court that his father was ill and bedridden. Attorneys for both the State and Petitioner agreed these two should be excused. Of the thirteen (13) Negroes remaining on the jury list, eight disqualified themselves by their answers. Each of these disqualifications were statutory and even Petitioner raises no objections thereto.

The remaining five Negroes on the special venire all were excused by the State through the exercise of peremptory challenges. It is in the dismissal of these five Negroes through peremptory challenges that the objection of Petitioner is centered. Because the State exercised its statutory peremptory challenges, or at least five of its fifteen (15), to keep these five members of the Negro race off the petit jury, Petitioner claims discrimination and violation of his rights as guaranteed by the 14th Amendment.

Such a contention has been decided adversely to Petitioner on numerous occasions.

This Court, in the case of *Frazier v. United States*, 335 U.S. 497, 206 (1948) said:

> "The right of peremptory challenge is given of course, to be exercised in the party's sole discretion and was so exercised here."

That the right of peremptory challenge of jurors is one to reject, not to select, has been held many times.[17] In *Hayes v. Missouri*, 120 U.S. 68, 70 (1887) this Court said:

> "Experience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases the peremptory challenge is protection against his being accepted."

Respondent submits that the peremptory challenge is designed to permit the attorney for either the State or the Defendant to exclude from a petit jury any person for any reason he sees fit. Lodge affiliations, church membership, civic club participation, a tenor of voice, a twinkle of an eye, may be reasons why an attorney chooses to exclude a person from a petit jury. Respondent submits these are reasons enough if the State or Defendant cares to exercise a peremptory challenge.

The peremptory challenge is a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the

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[17] *Pearce v. United States*, 192 Fed. 561 (C.C.A. 5th, 1911); *Hayes v. Missouri*, 120 U.S. 68 (1887); *Spies v. Illinois*, 123 U.S. 131 (1887). *McMurrin v. State*, 239 S.W. 2d 632 (Tex. Crim. App., 1951), writ of certiorari refused, 342 U.S. 874 (1951); *Ross v. State*, 246 S.W. 2d 884 (Tex. Crim. App., 1952), writ of certiorari refused, 343 U.S. 969 (1952).

constitutional guarantees of an impartial jury and a fair trial.[18] When such challenges are given by statute, however, they may be exercised completely at the option of either side for any reason. A Methodist would not be denied a fair trial or his privileges violated because fellow Methodists were excluded from the petit jury through use of the peremptory challenge. The same is true of a Mason, a member of the C.I.O., a member of the Jewish faith because the other members were challeneged, or any other conceivable member of any race, religion, organization, club or group. The peremptory challenge is a right given over and above legal or statutory qualifications to exclude persons from a petit jury.

In 50 Corpus Juris Secundum 1068, Sec. 280, Juries, it is said:

> "Peremptory challenges are challenges which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or without being required to assign a reason therefor. The law does not prohibit a party from using them where he has a reason for ridding, or cause to rid, himself of a juror, and the fact that a juror has been unsuccessfully challenged for cause does not preclude a subsequent peremptory challenge of the same juror. The right is not intended to enable a party to select particular jurors but merely to exclude from the panel objectionable persons whom he is unable successfully to challenge for cause, or as ordinarily expressed, the right is not to select but to reject.

[18] *Stilson v. United States*, 250 U S. 583 (1919).

> "The right of peremptory challenge is a substantial right and its freest exercise should be permitted. . . ."

Many authorities are cited to support this able and concise analysis of the peremptory challenge.[19] Respondent submits that the authorities are unbroken in support of its contention as to the use and design of peremptory challenges and that Petitioner could not have been denied privileges guaranteed him by the Federal Constitution through the use of peremptory challenges in this case.

Cases cited by Petitioner on this contention do not deal in any way with the use of peremptory challenges to reject certain people from petit juries.

There is no evidence in this case of systematic exclusion or limitation of Negroes on petit juries in

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[19] Among authorities cited for this statement are *Pointer v. Arkansas*, 151 U.S. 396 (1894); *Frazier v. United States*, 335 U.S. 497 (1948), rehearing denied 336 U.S. 907 (1949); *People v. Roxborough*, 307 Mich. 575, 12 N.W. 2d 466 (1943), certiorari denied in 323 U.S. 749 (1944), rehearing denied in 323 U.S. 815 (1944); *Berry v. Dannelly*, 226 Ala. 151, 145 So. 663 (1932); *Barber v. State*, 13 Fla. 675 (1871); *Wright v. City of Scranton*, 128 Pa. Super. 185, 194 A. 10 (1937); *Philbrook v. U.S.*, 117 F. 2d 632 (C.C.A. Neb. 1941), certiorari denied in 313 U.S. 577 (1941). *State v. Ferguson*, 187 La. 869, 175 So. 603 (1937); *People v. McQuade*, 110 N.Y. 284, 18 N.E. 156 (1888); *Olympic Realty Co. v. Kramer*, 283 Ky. 432, 141 S.W. 2d 293 (1940); *Messer v. Commonwealth*, 297 Ky. 772, 181 S.W. 2d 438 (1944); *State v. Thompson*, 68 Ariz. 386, 206 P. 2d 1037 (1949); *Bufford v. State*, 148 Neb. 38, 26 N.W. 2d 383 (1947); *Ross v. State*, 246 S.W. 2d 884 (Tex. Crim. App., 1952), certiorari denied in 343 U.S. 969 (1952); *Van Wagnor v. Union Pacific R. Co.*, 112 Utah 189, 186 P. 2d 293 (1947); *Hall v. U.S.*, 168 F. 2d 161 (C.C.A. of D.C., 1948), certiorari denied in 334 U.S. 853 (1948), rehearing denied in 335 U.S. 839 (1948).

Harris County, Texas. The record is that of an orderly selection of petit jurors based upon the legal process provided for by statute, which process petitioner does not challenge.

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court, and that the petition for writ of certiorari should be denied.

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APPENDIX

Statutory provisions in Texas dealing with grand jury commissions:[20]

"Article 333. Appointment of jury commissioners.

"The District Judge, at or during any term of court, shall appoint not less than three (3), nor more than five (5) persons to perform the duties of jury commissioners, and shall cause the sheriff to notify them of their appointment, and when and where they are to appear. The District Judge shall, in the order appointing such commissioners, designate whether such commissioners shall serve during the term at which selected or for the next succeeding term. Such commissioners shall receive as compensation for each day or part thereof they may serve the sum of Four ($4.00) Dollars, and they shall possess the following qualifications:

"1. Be intelligent citizens of the county and able to read and write the English language;
"2. Be qualified jurors and freeholders in the county;
"4. Be residents of different portions of the county;
"5. The same person shall not act as jury commissioner more than once in the same year.

"Art. 334. Notified of appointment.

"The judge shall cause the proper officer to notify such appointees of such appointment, and when and where they are to appear.

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[20] Texas Code of Criminal Procedure (Vernon 1948).

"Art. 335. Oath of commissioners.

"When the appointees appear before the judge, he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged.'

"Art. 336. Instructed.

"The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire in charge of the sheriff to a suitable room to be secured by the sheriff for that purpose. The clerk shall furnish them the necessary stationery, the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county.

"Art. 337. Kept free from intrusion.

"The jury commissioners shall be kept free from the intrusion of any person during their session, and shall not separate without leave of the court until they complete their duties.

"Art. 338. Shall select grand jurors.

"The jury commissioners shall select sixteen men from the citizens of different portions of the county to be summoned as grand jurors for the next term of court, or the term of court for which said commissioners were selected to serve, as directed in the order of the court selecting the commissioners.

"Art. 338a. Extension beyond term of period for which grand jurors shall sit in counties over 500,000.

"In all counties having a population of more than five hundred thousand (500,000) according to the last preceding Federal Census, if, prior to the expiration of the term for which the grand jury was empaneled, it is made to appear by a declaration of the foreman or of a majority of the grand jurors in open court, that the investigation by the grand jury of the matters before it cannot be concluded before the expiration of the term, the Judge of the District Court in which said grand jury was empaneled may, by the entry of an order on the minutes of said Court, extend, from time to time, for the purpose of concluding the investigation of matters then before it, the period during which said investigation of matters then before it, the period during which said grand jury shall sit, for not to exceed a total of ninety (90) days after the expiration of the term for which it was empaneled, and all indictments returned by the grand jury within said extended period shall be as valid as if returned before the expiration of the term.

"Art. 338b. Continuation of grand jury for successive terms.

"Section 1. Any district judge or criminal district judge, in a county having two (2) or more criminal district courts having previously empaneled a grand jury, shall have the power to continue such grand jury in session for successive terms for a period of not to exceed one (1) year when it appears to such district judge or criminal district judge that such grand jury has not completed its investigation of matters pending before it.

"Sec. 2. Any district judge or criminal district judge continuing a grand jury in session beyond its regular term shall note the reasons for such continuation on the minutes of his court, and any indictment returned by said grand jury after the expiration of its original term shall be as valid as if the same had ben returned during its regular term."

"Art. 339. Qualifications.

"No person shall be selected or serve as a grand juror who does not possess the following qualifications:

"1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony."

Statutory provisions in Texas dealing with selection and duties of the petit jury.[21]

"Article 587. "Special venire."

"A 'special venire' is a writ issued in a capital case by order of the district court, commanding the sheriff to summon such a number of persons, not less than thirty-six, as the court may order, to appear before the court on a day named in the writ; from whom the jury for the trial of such case is to be selected.

"Art. 588. Order for special venire.

"At any time after his arrest upon an indictment, the defendant may obtain an order for a special venire upon a written motion supported by the affidavit of himself or counsel, stating that he expects to be ready for the trial of his case at the present term of the court. The State's attorney may also obtain such order upon oral or written motion.

"Art. 589. Order of court.

"The order of court for the issuance of the writ shall specify the number of persons required to be

[21] Ibid.

summoned, and the time when they shall attend, and the time when such writ shall be returnable. The clerk shall forthwith issue the writ in accordance with such order.

"Art. 590. Setting capital cases.

"A capital case may by agreement of the parties be set for any particular day of the term with the permission of the court; or the court may at its discretion set a day for the trial or disposition of the same; and the day agreed upon by the parties, or fixed by the court, may be changed, and some other day fixed, should the court at any time deem it advisable.

"Provided that the court may at its discretion set any number of capital cases for the same day of the term, and only one venire shall be drawn for all capital cases set for the same day of the term.

"Each defendant shall be furnished a list of the venire for the day for which his case is set for trial, as already made and provided by law, and if either case set for trial shall go to trial, then it shall be in the discretion of the court whether the remaining veniremen shall be excused, or ordered back for service in the trial of the remaining case or cases to be tried that were set for trial on that day.

"Art. 591. Special venire in certain counties

"In all counties having a population of at least fifty-eight thousand, or having therein a city of twenty thousand or more population, as shown by the preceding Federal Census, whenever a special venire is ordered, the District Clerk, in the presence of and under the direction of the Judge, shall draw from

the wheel containing the names of the jurors the number of names required for such special venire, and prepare a list of such names in the order in which drawn from the wheel, and attach said list to the writ and deliver same to the sheriff. The cards bearing such names shall be sealed in an envelope and kept by said Clerk for distribution, as herein provided. If from the names so drawn, any of the men are impaneled on the jury and serve as many as four days, the cards bearing their names shall be put by the Clerk in the box provided for that purpose, and the cards bearing the names of the men not impaneled shall again be put by the Clerk in the wheel containing the names of eligible jurors.

Art. 592. Venire in other counties

"Whenever a special venire is ordered in counties not included within the provisions of the preceding article, the name of each person selected by the jury commissioners to do jury service for the term at which such venire is required shall be placed upon tickets of similar size and color of paper and the tickets placed in a box and well shaken up; and from this box the clerk, in the presence of the judge, in open court, shall draw the number of names required for such special venire, and shall prepare a list of such names in the order in which they are drawn from the box, and attach such list to the writ and deliver the same to the sheriff.

"Art. 593. Special venire list

"The jury commissioners shall select one man for every one hundred of population in any county, or a greater or less number if so directed by the court,

and these shall constitute a special venire list from which shall be drawn the names of those who shall answer summons to the special venire facias, after the petit jurors for the term have been drawn on any venire one time during such term. The drawing of the veniremen from the special venire list shall be done in the same manner prescribed for other jurors. No citizen who has served as a petit juror for one week during any term of court shall during said term be compelled to answer summons to more than one special venire; nor shall any citizen be compelled to answer summons to a special venire more than twice during any one term of court. The provisions of this and the succeeding article shall not apply in counties having a population of less than two thousand, nor to counties under the Jury Wheel Law.

"Art. 594. Further venire service

"Whenever the names of the persons selected by the jury commissioners to do jury service for the term shall have been drawn one time to answer summons to a special venire, then the names of the persons selected by said commissioners, and which form the special venire list, shall be placed upon tickets and drawn in the same manner as provided in the second preceding article; and the clerk shall prevent the name of any person from appearing more than twice on all of such lists.

"Art. 595. Venire ordered by court

"When, from any cause, no jurors have been selected by the jury commissioners for the term, or

when there shall not be a sufficient number of those selected to make the number required for the special venire, the court shall order the sheriff to summon a sufficient number of citizens who are qualified jurors in the county to make the number required by the special venire.

"Art. 596. Ordering talesmen

"On failure from any cause to select a jury from those summoned upon the special venire, the court shall order the sheriff to summon any number of men that it may deem advisable, for the formation of the jury.

"Art. 597. Service of writ

"The officer executing the writ shall summon the men whose names are upon the list attached to be before the court at the time named in the writ to serve as veniremen. Such summons may be verbal upon each juror in person or by mailing the summons to the persons named on the list at the address last known to the officer, by first class United States mail, as the judge of the court may direct.

"Art. 598. Return of writ

"The officer executing such writ shall return the same promptly on or before the time it is returnable. The return shall state the names of those summoned. and as to those not summoned, it shall state the diligence used to summon them and the cause of the failure to summon them.

"Art. 599. Instructions to sheriff

"When the sheriff is ordered by the court to summon persons upon a special venire whose names have not been selected under the Jury Wheel Law or the special venire list, the court shall, in every case, caution and direct the sheriff to summon such men as have legal qualifications to serve on juries, informing him of what those qualifications are, and shall direct him, as far as he may be able to summon men of good character who can read and write, and such as are not prejudiced against the defendant, or biased in his favor, if he knows of such bias or prejudice.

"Art. 600. Jury list served on defendant

"The clerk, immediately upon receiving the list of names of persons summoned under a special venire, shall make a certified copy thereof, and issue a writ commanding the sheriff to deliver such certified copy to the defendant. The sheriff shall immediately deliver such copy to the defendant, and return the writ, endorsing thereon the manner and time of its execution.

"Art. 601. Time of service

"No defendant in a capital case shall be brought to trial until he has had one day's service of a copy of the names of persons summoned under a special venire, except where he waives the right or is on bail. When such defendant is on bail, he shall not be brought to trial until after one day from the time the list of persons so summoned have been returned to the clerk of the court in which said case is pend-

ing; but the clerk shall furnish the defendant or his counsel a list of the persons so summoned, upon their application therefore.

"Art. 601-a. Special venire in counties having city of 231,500

"In counties having therein a city of at least two hundred and thirty-one thousand, five hundred (231,500) population as shown by the last preceding Federal Census, the Judge of the Court having jurisdiction of a capital case in which a motion for a special venire has been made, shall grant or refuse such motion for a special venire and upon such refusal the case to be tried by the regular jurors summoned for service, and such additional talesmen as may be ordered by the Court, in the Courts of such county where as many as one hundred (100) jurors have been summoned in such county for regular service for the week in which such capital case is set for trial, but the Clerk of such Court shall furnish the defendant or his counsel a list of the persons summoned for jury service for such work upon application therefor, and it is further provided that all laws and parts of laws in conflict with the provisions of this bill be and the same are hereby repealed to the extent of such conflict only."

"Article 602. Jurors called

"When a capital case is called for trial, and the parties have announced ready for trial, the namse of those summoned as jurors in the case shall be called. Those not present may be fined not exceeding fifty dollars. An attachment may issue on request of either party for any absent summoned juror, to have him brought forthwith before the court.

"Art. 603. Sworn to answer questions

"To those present the court shall cause to be administered this oath: 'You, and each of you, solemnly swear that you will make true answers to such questions as may be propounded to you by the court, or under its direction touching your service and qualification as a juror, so help you God.'

"Art. 604. Excuses

"The court shall then hear and determine excuses offered for not serving as a juror, and if he deems the excuse sufficient, he shall discharge the juror.

"Art. 605. Claiming exemption

"Any person summoned as a juror who is exempt by law from jury service, may, if he desires to claim his exemption, make an affidavit stating his exemption, and file it at any time before the convening of said court with the clerk thereo, which shall be sufficient excuse without appearing in person. The affidavit may be sworn to before the officer summoning such juror.

"Art. 606. One summoned upon a special venire may by consent of both parties be excused from attendance by the court at any time before he is impaneled.

"Art. 607. Challenge to array first heard

"The court shall hear and determine a challenge to the array before trying those summoned as to their qualifications.

"Art. 608. Challenge to the array

"Either party may challenge the array only on the ground that the officer summoning the jury has wilfully summoned jurors with a view to securing a conviction or an acquittal. All such challenges must be in writing setting forth distinctly the grounds of such challenge. When made by the defendant, it must be supported by his affidavit or the affidavit of any credible person. When such challenge is made, the judge shall hear evidence and decide without delay whether or not the challenge shall be sustained. This article does not apply when jurors summoned have been selected by jury commissioners.

"Art. 609. When challenge is sustained

"The array of jurors summoned shall be discharged if the challenge be sustained, and the court shall order other jurors to be summoned in their stead, and direct that the officer who summoned those so discharged, and on account of whose misconduct the challenge has been sustained shall not summon any other jurors in the case.

"Art. 610. List of new venire

"When a challenge to the array has been sustained, the defendant shall be entitled, as in the first instance, to service of a copy of the list of names of those summoned by order of the court.

"Art. 611. Court to try qualifications

"When no challenge to the array has been made, or if made, has been overruled, the court shall proceed

to try the qualifications of those present who have been summoned to serve as jurors.

"Art. 612. Mode of testing

"In testing the qualifications of a juror after he has been sworn, he shall be asked by the court, or under its direction:

"1. Are you a qualified voter in this county and State, under the Constitution and laws of this State?

"2. Are you a householder in the county, or a freeholder in the State?

"If he answers both questions in the affirmative, the court shall hold him to be a qualified juror until the contrary be shown by further examination or other proof.

"Art. 613. Passing juror for challenge

"A juror held to be qualified shall be passed for acceptance or challenge first to the State and then to the defendant. Challenges to jurors are either peremptory or for cause.

"Art. 614. A peremptory challenge.

"A peremptory challenge is made to a juror without assigning any reason therefor.

"Art. 615. Number of challenges.

"In capital cases, both the State and defendant shall be entitled to fifteen peremptory challenges. Where two or more defendants are tried together, the State shall be entitled to eight peremptory challenges for each defendant; and each defendant shall be entitled to eight peremptory challenges.

"Art. 616. Reasons for challenge for cause.

"A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. It may be made for any one of the following reasons:

"1. That he is not a qualified voter in the State and county, under the Constitution and laws of the State.

"2. That he is neither a householder in the county nor a freeholder in the State.

"3. That he has been convicted of theft or any felony.

"4. That he is under indictment or other legal accusation for theft or any felony.

"5. That he is insane or has such defect in the organs of seeing, feeling or hearing, or such bodily or mental defect or disease as to render him unfit for jury service.

"6. That he is a witness in the case.

"7. That he served on the grand jury which found the indictment.

"8. That he served on a petit jury in a former trial of the same case.

"9. That he is related within the third degree of consanguinity or affinity to the defendant.

"10. That he is related within the third degree of consanguinity or affinity to the person injured by the commission of the offense, or to the private prosecutor, if there be one.

"11. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime.

"12. That he has a bias or prejudice in favor of or against the defendant.

"13. That from hearsay or otherwise there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged; if he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communi cations, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged.

14. That he cannot read and write. This cause of challenge shall not be sustained when it appears to the court that the requisite number of jurors who are able to read and write cannot be found in the county.

"Art. 617. Other evidence on challenge.

"Upon a challenge for cause, the examination is

not confined to the answers of the juror, but other evidence may be heard for or against the challenge.

"Art. 618. Certain questions not to be asked.

"In examining a juror, he shall not be asked a question the answer to which may show that he has been convicted of an offense which disqualifies him, or that he stands charged by some legal accusation with theft or any felony.

"Art. 619. Absolute disqualification.

"No juror shall be impaneled when it appears that he is subject to the third, fourth or fifth clause of challenge in Article 616, though both parties may consent.

"Art. 620. Names called in order.

"In selecting the jury from the persons summoned, the names of such persons shall be called in the order in which they appear upon the list furnished the defendant. Each juror shall be tried and passed upon separately. A person who has been summoned, but who is not present, may, upon his appearance before the jury is completed, be tried as to his qualifications and impaneled as a juror, unless challenged; but no cause shall be unreasonably delayed on account of such absence.

"Art. 621. Judge to decide qualifications.

"The court is the judge, after proper examination, of the qualifications of a juror, and shall decide all challenges without delay and without argument thereupon.

"Art. 622. Oath to each juror.

"As each juror is selected for the trial of the case, the following oath shall be administered to him by

the court, or under its direction: 'You solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render, according to the law and the evidence, so help you God.'

"Art. 623. Jurors shall not separate.

"The court may adjourn veniremen to any day of the term; but when jurors have been sworn in a case, those so sworn shall be kept together and not permitted to separate until a verdict has been rendered or the jury finally discharged, unless by permission of the court, with the consent of each party and in charge of an officer.

"Art. 624. Persons not selected.

"When a jury of twelve men has been completed, the others in attendance under a summons to appear as jurors in the case shall be discharged from further attendance therein.

"Art. 625. Special pay for veniremen.

"Veniremen summoned on special venire who have been challenged on their voir dire, shall each be paid out of the jury fund Two Dollars ($2) for each day he attends court on said summons. If the regular venire shall be exhausted, and talesmen summoned as provided by law, the talesmen challenged on their voir dire shall each be paid out of the jury fund Two Dollars ($2) for each day he attends court on said summons, and no greater sum shall be paid challenged veniremen and talesmen regardless of the number of cases to which they shall be summoned in any one day. All veniremen and talesmen taken on trial juries shall receive the same per diem paid petit jurors.